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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

HOWARD LIONEL TOFT, *Petitioner,*

v.

MARY G. KETCHUM, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner, Howard Lionel Toft, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above entitled case on May 2, 1955.

OPINIONS BELOW

The Superior Court rendered no opinion.

The opinion of the Supreme Court of New Jersey, printed as Appendix A, *infra,* is reported at 18 N.J. 280, 113 A. 2d 671. The Supreme Court's Opinion on Reargument, printed as Appendix C, *infra,* is reported at —— N.J. ——, 114 A. 2d 863.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on May 2, 1955 (Appendix B, *infra*). After reargument, the Supreme Court affirmed its earlier judgment on June 20, 1955 (Appendix C, *infra*). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

May a state court deny to lawyers the right to bring actions for malicious prosecution based upon false and malicious complaints to an official body, and at the same time uphold the right of all other members of the community—including members of other professions and licensed occupations—to bring such actions under like circumstances?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in relevant part as follows:

> "... nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

A. Prior Proceedings

Petitioner is a duly licensed and practicing attorney at law of the State of New Jersey (2a).[1] On Septem-

[1] This Petition makes reference to the following: Appendix to Brief of Plaintiff-Appellant used in the Court below, which accompanies this Petition; Certified Transcript of the proceedings below on file in the Office of the Clerk of this Court; and the Appendix to this Petition which is a part hereof. References to the Appendix

ber 24, 1953, Respondent made a complaint to the Monmouth County Ethics and Grievance Committee charging Petitioner with unprofessional and unethical conduct. After four days of hearings at which Petitioner and other witnesses appeared, the Grievance Committee filed a presentment with the Supreme Court of New Jersey charging the Petitioner with unethical and unprofessional conduct (App. 1). Thereafter, the New Jersey Supreme Court issued an order to show cause why Petitioner should not be disbarred or otherwise disciplined. On March 1, 1954, after the submission of briefs and oral argument, the Supreme Court discharged the show cause order (App. 2) thereby acquitting Petitioner of the charge against him.

On August 26, 1954, Petitioner instituted the present action for malicious prosecution against Respondent in the New Jersey Superior Court (App. 2). His complaint alleged *inter alia:* that the complaint which Respondent had filed against him with the Grievance Committee was false and without reasonable and probable cause; that Respondent had made the said charge maliciously; that the complaint made against him was ultimately dismissed; and that by reason of the said false and malicious prosecution, Petitioner had been greatly injured in his personal reputation and professional standing (2a-4a).

Respondent moved to dismiss the complaint on the ground that it failed to state a cause of action (10a). In substance, two bases for this motion were set out:

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to Brief of Plaintiff-Appellant are designated by "a" following the page number; references to the Appendix to this Petition are designated by "App." preceding the page number; and references to the Certified Transcript are designated by "Tr." preceding the page number.

(1) that there had been no prior suit between the parties, an essential element for an action for malicious prosecution; and (2) that a suit by a lawyer for malicious prosecution grounded upon a complaint made to an Ethics and Grievance Committee is against public policy (10a-11a). After briefs and argument, the trial court granted the motion to dismiss (12a-16a). In doing so, that court stated that Petitioner's complaint could not be sustained "as a matter of public policy" (14a), emphasizing that it wanted "to put [the ruling dismissing the complaint] on the broadest ground. . . ." (15a).

Petitioner then appealed to the Appellate Division of the New Jersey Superior Court (18a).

While the case was pending in the Appellate Division, and prior to oral argument, the New Jersey Supreme Court on its own motion certified the appeal directly to the Supreme Court (App. 2).

The case was argued in the Supreme Court on March 7, 1955, and that Court rendered its decision affirming the judgment of the Superior Court on May 2, 1955. In addition to the majority opinion, there was a concurring opinion, and two separate dissenting opinions (Appendix A, *infra*).

On May 10, 1955, Petitioner filed a petition for rehearing. At the same time, the New Jersey State Bar Association filed a petition for leave to intervene as *amicus curiae* and a petition for rehearing. The petition for rehearing was granted on May 23, 1955, and the Bar Association was granted leave to file a brief *amicus curiae* (Tr. VI). After reargument on June 13, 1955, the Court reaffirmed its prior decision in a brief per curiam opinion issued on June 20, 1955, indi-

cating that all of the Justices adhered to their previous positions as expressed in the four opinions originally rendered (Appendix C, *infra*).

B. The Opinions Below

Four separate opinions were filed by the seven justices who composed the Court below.

The opinion of the Court, delivered by Chief Justice Vanderbilt, dealt first with the question of whether a malicious prosecution action may be based upon the institution of a proceeding before other than a judicial tribunal. On this issue, the Court rejected the contention of Respondent that a proceeding before a judicial tribunal was necessary, and held that

> "a malicious prosecution may be predicated upon the institution of other than a judicial action, at least where such proceedings are adjudicatory in nature and may adversely affect legally protected interests." (App. 3)

Having thus disposed of the threshold issue, the Court then posed the "basic question": "whether public policy requires that the filing of a complaint with an ethics and grievance committee be privileged." (App. 4) The conflicting policy considerations were stated as being:

> "on the one hand there is the injury that may be suffered by any attorney as a result of the institution of disciplinary proceedings against him on what turns out to be improper or groundless charges." (App. 4)

and

> "on the other hand . . . it is in the public interest to encourage those who have knowledge of any un-

> ethical conduct of attorneys to present such information to the . . . ethics and grievance committee so that this court may carry out its constitutional disciplinary duties." (App. 4)

In weighing these conflicting interests, the Court emphasized the fact that it had been "charged by the Constitution with the solemn duty of ridding the bar of those who are unfit to practice our profession" (App. 5).[2] So, while taking cognizance of the fact that "to deprive an attorney of his right to recover damages in a civil action for the malicious filing of such a complaint without probable cause occasionally works a hardship," it nevertheless concluded that "this result must follow . . . to maintain the high standards in our bar" (App. 6). Accordingly, it held:

> "that the filing of a complaint with an ethics and grievance committee is privileged and that *an attorney cannot predicate a malicious prosecution action or similar suit upon it*" (App. 6) (Emphasis added).

Justice Jacobs, concurring separately (App. 6-11), expressed the view that Petitioner's complaint should have been dismissed because, in the light of the facts developed in the disciplinary proceedings, he believed that Petitioner was "in no just position to show lack of probable cause" (App. 8, 11). But he refused to join the majority in its announcement of "the far-reaching doctrine . . . that an attorney has no individual

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[2] New Jersey's Constitution, Article 6, Sec. 2, par. 3, provides in relevant part:

> "The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

redress no matter how patently false and malicious is the charge against him or how grossly hurtful is the wrong committed against him" (App. 8). In support of its position, he pointed out, the majority could cite no decisions, and, indeed, the decisions cited by the majority "all lend persuasive support to the contrary view" (App. 8). There follows in Justice Jacobs' opinion a discussion of the authorities (App. 8-9), and, finding substantial unanimity, Justice Jacobs then disposes of the "notion that the granting of protection to the individual attorney might impair the public interest by discouraging disclosures of misconduct." This argument, he points out, has "little substance" for an action for malicious prosecution may be maintained "only upon an affirmative showing that the ethics complaint was actually malicious, lacked probable cause and resulted in special injury. . . . It is difficult to believe that recognition of the action as thus limited would discourage any ethics complaints which ought to justly be made" (App. 10). His conclusion is succinctly stated:

> "While the individual attorney is entitled to no greater judicial protection . . . than the law affords to those who follow other professions and occupations, he is, in all justice, entitled to no less. The contrary holding, that those who devote so much of their lives towards attaining equal protection under law for others should be denied it for themselves, seems ironic indeed." (App. 10)

Both dissenting Justices agreed with Justice Jacobs that Petitioner should have a substantive right of action for malicious prosecution, but did not agree that the issue of lack of probable cause could be considered at this stage of the proceedings. Justice Burling's opinion dealt with certain technical issues and he sug-

gested the reinstatement of the complaint and further proceedings (App. 13). Justice Wachenfeld expressed strong disagreement with the majority's view that the public interest required the denial to attorneys of the right to protect themselves from malicious and false complaints. "Those who have legitimate grievances against attorneys need no cloak of immunity as an inducement to file complaints with grievance committees. Granting immunity will only serve to encourage the use of disciplinary proceedings as privileged sanctuaries to carry on personal vendettas and excursions of ill will . . . It will weaken, rather than strengthen, the disciplinary process. . . ." (App. 12-13) Justice Wachenfeld's disagreement with the majority's conclusion is best summarized in his own words:

> "I cannot join the majority when it concludes that the public interest . . . makes it necessary to *deny relief to an attorney* for the wrong which he has suffered—*relief which would ordinarily be available to any other member of the community in like circumstances.*" (App. 11-12) (Emphasis added.)

C. The Raising of the Federal Question

Because of the unusual manner in which this case was advanced through the New Jersey court system, the federal question on which review is being sought was not clearly and expressly raised until reargument in the New Jersey Supreme Court, which constituted Petitioner's first and in effect only opportunity to present the question.

In the trial court (Law Division, Superior Court), following the filing of Petitioner's complaint, the sole proceeding was an argument on a motion to dismiss upon which the trial judge ruled from the bench (12a-

16a). At this early stage in the proceedings, both Court and counsel were naturally concerned with the complex of preliminary problems always present in a law suit at its inception and there was no way to anticipate the possibility that the trial judge's ruling on the motion might ultimately give rise to a federal question.

When appeal was taken to the Appellate Division of the Superior Court from the trial judge's decision—since no opinion had been rendered by the trial judge—emphasis in the briefs was again placed upon the same problems which had engendered dispute in the trial court.[3] And when the Supreme Court, on its own motion, certified the case from the Appellate Division prior to argument, it had before it only the briefs submitted to the Appellate Division. Thus, it was not until after the Supreme Court issued its opinions—the first formal opinions rendered in the case—that the federal question, for which review is now being sought, became exposed.

Following the Supreme Court's decision, the federal question was expressly presented and strongly emphasized. Thus, Point I of Petitioner's Brief on Rehearing stated the question as whether "the majority opinion offends constitutional limitations . . . in that,—(a) it denies members of the bar the equal protection of the laws in violation of Section 1, Amendment XIV, of the Constitution of the United States," and also whether it deprives attorneys of their property without due

[3] At this stage the federal question was indirectly raised. Petitioner argued that to sustain the trial court's decision on the broad public policy ground "would, of necessity, result in relegating the members of an honorable profession to the status of second class citizens" (Brief of Plaintiff-Appellant, p. 12, at Tr. II); and Respondent argued to the contrary (Brief for Respondent, pp. 7-8).

process of law (pages 3-5, on rehearing, Brief of Plaintiff-Appellant, Tr. III). And the brief of the New Jersey State Bar Association as *amicus curiae* submitted pursuant to order of the Court, similarly raised the federal constitutional question expressly. (On Rehearing, Brief of the New Jersey State Bar Association, Intervenor and *Amicus Curiae*, pp. 10-12).

On rehearing, there was an actual oral reargument of the case, and new and additional briefs were submitted. Moreover, there was no adequate state ground on which to permit the decision to rest once the federal constitutional right was set up and claimed. In consequence, the federal question on which review is now being sought was necessarily passed upon by the Supreme Court of New Jersey when it reaffirmed its earlier decision by the subsequent per curiam opinion.[4] In view of the extraordinary fashion in which this case was brought to fruition, and the obvious inability of Petitioner to anticipate the unique decision of the Supreme Court of New Jersey, the federal question was raised at the first reasonable opportunity, *cf. Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U.S. 358, 366-7; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-8; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 320; and is accordingly appropriate for review by this Court.

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[4] Language contained in two of the four opinions rendered in the Supreme Court indicates that the federal question had *in fact* been considered. Justice Wachenfeld noted that the relief being denied by the Court to attorneys was "available to any other member of the community in like circumstances" (App. 12); and Justice Jacobs characterized the majority's holding as denying to attorneys "equal protection under law" (App. 10).

REASONS FOR GRANTING THE WRIT

The decision below, at the outset, expressly upholds the right to predicate an action for malicious prosecution or similar suit upon the institution of other than a judicial proceeding, where such proceedings are adjudicatory in nature and may adversely affect legally protected interests (App. 3). As illustrations of the application of this principle, and using the cases cited by the Court below, an insurance agent would be permitted to predicate a malicious prosecution action upon a proceeding aimed at revoking his insurance license, *cf. National Surety Co.* v. *Page,* 58 F. 2d 145 (C.A. 4, 1932); a private detective could proceed upon a false complaint lodged with the licensing authorities, *cf. Melvin* v. *Pence,* 130 F. 2d 423 (C.A.D.C. 1942); a radio broadcaster could proceed on the basis of a malicious protest filed with the Federal Communications Commission, *cf. Rivers* v. *Dixie Broadcasting Corp.,* 88 Ga. App. 131, 76 S.E. 2d 229 (Ct. App. 1953); and a real estate broker, upon a false complaint filed with a real estate commission, *cf. Saum* v. *Proudfit,* 122 N.J.L. 96 (Sup. Ct. 1939).[5]

Having thus broadly established the right for persons who have been injured under the defined circumstances to procure relief in the courts through an action for malicious prosecution or similar suit, the decision below thereupon denies this right to attorneys. This holding, i.e., "that an attorney cannot predicate a malicious prosecution action or similar suit" upon a complaint made to a grievance committee, is founded upon

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[5] Another instance might be: a policeman, upon a complaint to the police department, *cf. Fulton* v. *Ingalls,* 165 App. Div. 323, 151 N.Y.S. 130 (N.Y. 1914); aff'd *sub nom. Fulton* v. *Richmond County Soc.,* 214 N.Y. 665, 108 N.E. 1094 (1915).

no legislative statute or policy, but rather upon a vaguely defined "public policy" which the Court purports to find in a routine state constitutional provision which gives to it "jurisdiction over the admission to the practice of law and the discipline of persons admitted." *N.J. Const., Art. 6, Sec. 2, Par. 3.* In so ruling, and in denying Petitioner's claim that this decision constituted a denial of due process and of the equal protection of the laws the Court below has decided a federal question of substance not heretofore decided by this Court in a manner which does not appear to accord with applicable principles announced by this Court.

A. As this Court has only recently noted: "The problem of . . . classification is a perennial one, admitting of no doctrinaire definition." *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489; and a state has substantial leeway under the Equal Protection Clause. *Ibid;* see *Smith* v. *Cahoon,* 283 U.S. 553, 566.[6] Nevertheless, it is also established that the Equal Protection Clause does prohibit "invidious discrimination," *Williamson* v. *Lee Optical Co., supra; Barbier* v. *Connolly,* 113 U.S. 27, 30, and distinctions which are arbitrary or irrational. *Cf. Ohio ex rel. Clarke* v. *Deckebach,* 274 U.S. 392, 397; *Smith* v. *Cahoon, supra,* at 566-7.

This Court has defined the "applicable principle in respect of classification" as follows:

> "the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, . . . and . . . it applies to the

[6] The decisions of this Court dealing with permissible classifications under the Equal Protection Clause have generally arisen in instances where state *statutes* have been challenged. In this case, however, no state statute is involved. See pp. 19-20, *infra.*

> exercise of *all* the powers of the state which can affect the individual or his property.... Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision....
>
> "Despite the broad range of the State's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture.... They cannot stand as reasonable if they offend the plain standards of common sense." *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison*, 301 U.S. 459, 461-2 (Emphasis added).

In this case, the Court below has set attorneys in a class by themselves and has taken from them a cause of action available to other members of the community under like circumstances. The distinction between lawyers and other licensed professions and occupations in the context of the issue presented offends "the plain standards of common sense." Certainly, as a *prima facie* proposition, it appears also to offend the guaranties of the Fourteenth Amendment, for "Equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the courts both for relief and for defense under like conditions and with like protection and without discrimination." *Arizona Commercial Mining Co.* v. *Iron Cap Copper Co.*, 236 Mass. 185, 194, 128 N.E. 4, 7 (1920).

The only justification set forth by the Court below for its unprecedented ruling is the possibility that a putative complainant might be discouraged from presenting legitimate charges to an ethics and grievance committee against an attorney who has been guilty of unethical conduct because he might subsequently be subject to a

malicious prosecution action by the accused attorney. (App. 6) But as Justice Jacobs points out in his concurring opinion, the majority's notion "seems to have little substance" since it

> "must be remembered that the action in the nature of malicious prosecution would be maintainable *only* upon an affirmative showing that the ethics complaint was *actually* malicious, lacked probable cause and resulted in special injury; it would *not* be maintainable where the complaining party, though mistaken, acted with that elemental honesty of purpose and belief which may rightly be expected of all complainants. *It is difficult to believe that recognition of the action as thus limited would discourage any ethics complaints which ought to justly be made.*" (App. 10) (Emphasis added).

And Justice Wachenfeld, dissenting, goes even further:

> "Those who have legitimate grievances against attorneys need no cloak of immunity as an inducement to file complaints with grievance committees. Granting immunity will only serve to encourage the use of disciplinary proceedings as privileged sanctuaries to carry on personal vendettas and excursions of ill will disassociated from the true facts in a cause. It will weaken rather than strengthen the disciplinary process. . . ." (App. 12-13).

But even more important than the insubstantiality of the majority's position, is the question of why the same considerations of policy which it has made use of—however improvident and unwise—do not also apply with equal force to persons in other professions or licensed occupations; and the further question of the propriety, in a constitutional sense, of imposing this unusual restriction upon lawyers alone.

Certainly it is no more "in the public interest" to protect real estate and insurance salesmen from false and malicious complaints, than it is to protect members of the bar. No good reason suggests itself why it is any more "in the public interest" to encourage complaints against lawyers than against doctors, engineers, accountants, policemen, private detectives, and many others. If it is "in the public interest" to encourage complaints against lawyers, why should not the filing of complaints against persons serving in other professions and occupations affected with a public interest also be held "free from any threats of or danger of a possible malicious prosecution suit"? As Justice Jacobs so aptly observed: "while the individual attorney is entitled to no greater judicial protection under these circumstances than the law affords to those who follow other professions and occupations, he is, in all justice entitled to no less" (App. 10).

The decisions of this Court sustaining state laws regulating professional activities, e.g., *Williamson* v. *Lee Optical Co., supra; Semler* v. *Dental Examiners,* 294 U.S. 608; *Barsky* v. *Board of Regents,* 347 U.S. 442, 451; seem inappropriate here, for in the instant case, there is no regulatory scheme involved. This is not a situation where a legislature has selected "one phase of one field and [applied] a remedy there, neglecting the others." *Cf. Williamson* v. *Lee Optical Co., supra; A.F. of L.* v. *American Sash Door Co.,* 335 U.S. 538. Rather, it is an instance where a state court has selected a single special class and closed the courts to it, at the same time holding the courts open to all other members of the community under like circumstances. It is more pointed discrimination than regulation, and appears to fly in the face of this Court's admonition that the Four-

teenth Amendment intends that "all persons . . . should have like access to the courts . . . for the protection of their persons and property, the prevention and redress of wrongs, and . . . no impediment should be interposed . . . except as applied to . . . others under like circumstances." *Barbier* v *Connolly,* 113 U.S. 27, 31. See also *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison, supra.*

In instances where states have abolished causes of action, they have done so on an across-the-board basis applicable to all alike. For example, in the statutes abolishing civil actions for alienation of affections, criminal conversation, seduction and breach of promise to marry, e.g., *Civil Practice Act, N.Y.,* Sec. 61-a. and b.; see *Fearon* v. *Treanor,* 272 N.Y. 268, 5 N.E. 2d 815, remittitur amended, 273 N.Y. 645, 8 N.E. 2d 36, app. dismissed, 301 U.S. 667; the actions are not denied to any particular class of persons, but to *all* members of the community. Indeed, had they done otherwise, a substantial constitutional question would have been presented. *Cf. Langdon* v. *Sayre,* 74 Cal. App. 2d 41, 45, 168 P. 2d 57, 60 (1946).[7]

That is the vice in the ruling below. In focusing only upon lawyers when there is no rational basis for doing so, in abolishing a cause of action for lawyers and retaining the cause for persons other than lawyers under like circumstances, the Court below appears to have gone even beyond the broad range permitted by

[7] Again it should be noted that in cases where this Court has upheld the right of a state to abolish common law rights, see *e.g., N.Y. Central* v. *White,* 243 U.S. 188, 198, 200; *Silver* v. *Silver,* 280 U.S. 117, 123-4; *Mondou* v. *N.Y., N.H. & H.R.,* 223 U.S. 1, 50, state statutes were generally involved, whereas no statute is involved in the instant case. See pp. 19-20, *infra.*

this Court's decisions, and has denied to Petitioner "the equal protection of the laws" guarantied by the Fourteenth Amendment.

B. The decision below also presents a question under the Due Process Clause.

This Court long ago held that attorneys, after admission to practice, have a legally protectible interest of which they may not be deprived without due process of law. *Ex parte Garland,* 71 U.S. 333, 379; *Ex parte Wall,* 107 U.S. 265, 288. Moreover, it is well established that the "right to pursue a lawful business is a property right that the law protects against *unjustifiable* interference. Any act or omission which unjustifiably disturbs or impedes the enjoyment of such a right constitutes its wrongful evasion and is properly treated as tortious." *Kamm* v. *Flink,* 113 N.J.L. 582, 586 (E. & A. 1934).

Indeed, this Court has observed: "A right of action to recover damages for an injury is property . . . neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged." *Angle* v. *Chicago, St. P.M. & O.R. Co.,* 151 U.S. 1, 19; and this observation would seem to be equally as applicable to the actions of courts.

Despite this, the decision below summarily strips from attorneys the right to seek relief and redress from false and malicious accusers. It establishes an absolute pardon in advance for a class of private wrongdoers from civil liability. It requires attorneys to stand defenseless and mute against onslaughts to their reputation, no matter how false, malicious or unjustified, although false accusations of unprofessional conduct

can perhaps have more damaging consequences to lawyers than to any other group in the community.

A lawyer does not deal in goods; he maintains no inventories. His sole stock in trade are his integrity, reputation and competence. Take his reputation and, like removing one leg of a three-legged stool, he falls. He is seriously injured, and the opportunity to pursue his livelihood is impaired, if not entirely destroyed. When reputations are in issue, the stakes are indeed high for the lawyer.

Even the majority opinion of the Court below conceded that the rule it was promulgating might work "a hardship" upon attorneys (App. 6). Justice Jacobs pointed out that false, malicious and individualized attacks upon lawyers "wrongfully place in jeopardy the reputation and very livelihood of the particular practitioner involved" (App. 10). And Justice Wachenfeld observed:

> "An attorney, *perhaps more than anyone else,* may suffer serious injury when false and malicious accusations of unprofessional conduct are lodged against him in the form of a complaint before a grievance committee." (App. 11) (Emphasis added.)

As the decisions of Justices Jacobs and Wachenfeld demonstrate, the rule promulgated by the majority is not necessary in order to avoid discouraging legitimate complaints of unethical conduct to grievance committees, because those with legitimate grievances need no cloak of immunity. *Supra,* pp. 13-14. On the other hand, as is apparent, the rule is unduly oppressive upon attorneys and imposes unusual and unnecessary restrictions upon them in the pursuit of their profession. *Cf.*

Lawton v. *Steele,* 152 U.S. 133, 137. In this view, the decision below does not appear to conform to the standards which have been established to test state regulation under the Due Process Clause, and should be reviewed by this Court.

C. As indicated *supra,* the Court below has predicated its decision on its notion of public policy stemming from "our constitutional duty to maintain the high standards in our bar." (App. 6) But this Court has earlier cautioned:

> "The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, *should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection.*" *Patton* v. *United States,* 281 U.S. 276, 306. (Emphasis added.)

The constitutional provision upon which this "duty" is founded is a typical one granting jurisdiction to the court to discipline members of the bar.[8] It contains no implication or suggestion to justify or authorize the abolition of a cause of action for malicious prosecution or similar suit; there is certainly no direct relation between the abolition of a cause of action for malicious prosecution and "the discipline of persons admitted." There is, moreover, no statutory provision upon which the majority's ruling may be bottomed. In consequence, the decision below — unsupported by any clear constitutional or legislative foundation — must be viewed for what it is: a pronouncement by a majority of the Justices of the highest state court stripping

[8] See fn. 2, p. 6, *supra.*

certain common law rights from only one class of people in the community. If the "legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations," *Lawton* v. *Steele,* 152 U.S. 133, 137, it would seem *a fortiorari* that a court may not.

The fact that the action complained of is that of the state court rather than of the state legislature imparts a special feature to this case. For, while action of a state court is no less "state action" within the meaning of the Fourteenth Amendment,[9] many of the principles announced by this Court in considering challenges to state regulation are inapposite here.

The action here is not by a state legislature so as to justify application of the oft-repeated statement of Chief Justice Waite made in *Munn* v. *Illinois,* 94 U.S. 113, 114, "For protection against abuses by legislatures the people must resort to the polls, not the courts." *Cf. Williamson* v. *Lee Optical Co., supra* at 488. There is no way here to defer to the judgment—theoretical or actual—of the state legislature, *cf. Tigner* v. *Texas,* 310 U.S. 141, for the state legislature is not involved. There is no need to allow "latitude . . . for the legislative appraisement of local conditions," *Ohio ex rel. Clarke* v. *Deckebach,* 274 U.S. 392, 397, for the problem is not a local one, and the appraisement was not legislative. And this is not an instance in which this Court will be sitting "as a super-legislature to weigh the wisdom of legislation," *Day-Brite Lighting* v. *State of Missouri,* 342 U.S. 421, 423, for the Justices of the Court below had no more facts before them in their consideration

[9] *Shelley* v. *Kraemer,* 334 U.S. 1, 14 *et seq.*

of the question presented by this case, than this Court would have if it grants review.

* * * * * *

In view of the constitutional questions involved, review of this case by this Court seems plainly warranted, since "objections which go to constitutionality" are still the concern of this Court. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 550. But, in addition, the decision below has broad ramifications.

Not only does it directly affect every lawyer in New Jersey, but also may affect lawyers in other jurisdictions who seek to bring a malicious prosecution action or similar suit in New Jersey for a false and malicious complaint made to an ethics committee elsewhere. And, under *Erie Rd. Co.* v. *Tompkins*, 304 U.S. 64, the federal courts sitting in New Jersey would be bound to apply it. *Cf. O'Connor* v. *Johnson*, 74 F. Supp. 370, 377-8 (W.D.N.Y. 1947). Moreover, the same sort of reasoning and the same resort to policy considerations which the Court below employed in this case to deny an action for malicious prosecution or similar suit can be utilized to impose limitations and restrictions of other kinds upon attorneys. Finally, provisions granting plenary power over attorneys, similar to that relied on by the Court below, appear in the constitutions and statutes of many other states; and, in consequence, the decision below may well become the foundation for a spate of special rulings for and against lawyers on this and other similar issues in numerous jurisdictions. Certainly, in an area of the law as fundamental and delicate as that involved in this case, the important question presented should not be left unresolved.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

(Opinion of the Court Below)

SUPREME COURT OF NEW JERSEY
No. A117, September Term, 1954

HOWARD LIONEL TOFT, *Plaintiff-Appellant*,

vs.

MARY G. KETCHUM, *Defendant-Respondent*.

Argued March 7, 1955; decided May 2, 1955.

On appeal from the Law Division of the Superior Court, certified by this Court on its own motion while pending in the Appellate Division of the Superior Court.

Mr. Martin Kimmel argued the cause for the appellant (Mr. J. Chester Massinger, attorney)

Mr. Oliver R. Kovacs argued the cause for the respondent (Messrs. Clausen, Klein & Kovacs, attorneys; Mr. Walter Waverczak, of counsel)

The opinion of the Court was delivered by

VANDERBILT, C. J.

This appeal involves a determination as to whether the defendant may be liable to the plaintiff, an attorney at law, for malicious prosecution.

On September 24, 1953 the defendant filed a complaint in accordance with *R. R. 1:16-4* with the Monmouth County Ethics and Grievance Committee, charging the plaintiff with improper conduct. A copy of the complaint was served upon the plaintiff, who in due course filed his answer. The Committee conducted hearings on four different days in November, 1953, at which witnesses on both sides were examined and cross-examined pursuant to R.R. 1:16-4 (g) as a result of which the committee filed a presentment with this court charging the plaintiff with unethical and unprofessional conduct. On due consideration of the

presentment and the supporting testimony we issued an order to show cause why the plaintiff should not be disbarred or otherwise disciplined. After studying the briefs and hearing oral argument on the return of the order to show cause, we discharged the order to show cause for the reason that it appeared that the plaintiff herein was not acting as an attorney at law when the alleged unethical conduct took place, but rather that he was engaged in business operations as a real estate broker and the complaint should have been made to the New Jersey Real Estate Commission, N.J.S.A. 45:15-17, rather than to an ethics and grievance committee of this court. We did not attempt to pass upon the conduct of the plaintiff as a real estate broker nor on the question of the jurisdiction of this court under the Constitution with respect to the actions of an attorney at law in business matters not directly related to the practice of law. In subsequent cases, *In re Genser*, 15 N.J. 600, 606 (1954), *In re Carlsen*, 17 N.J. 338, 346 (1955), however, we have taken jurisdiction over matters involving unethical conduct of attorneys at law in non-legal matters and if the disciplinary case involving the plaintiff herein had come before us subsequent to these decisions we would have gone into the merits of the charge.

On August 26, 1954 the plaintiff instituted this action in the Superior Court for malicious prosecution, claiming that the complaint filed by the defendant with the Monmouth County Ethics and Grievance Committee was false and without reasonable or probable cause, and that as a result thereof his professional reputation suffered and he was forced to expend money in his defense. The defendant moved to dismiss the complaint on the ground that it failed to set forth a cause of action and her motion was granted by the trial court. The plaintiff appealed and we certified the appeal on our own motion prior to oral argument in the Appellate Division of the Superior Court.

The defendant claims that the dismissal of the complaint should be upheld because an action for malicious prosecution cannot be predicated upon the institution of a proceeding before other than a judicial tribunal. We cannot agree with this general statement of law, because we incline on principle toward the weight of authority in this country, which supports the view that under certain circumstances a malicious prosecution may be predicated upon the institution of other than a judicial action, at least where such proceedings are adjudicatory in nature and may adversely affect legally protected interests, *National Surety Co.* v. *Page,* 58 F. (2d) 145 (C.C.A. 4, 1932), *Melvin* v. *Pence,* 130 F. (2d) 423, 143 A.L.R. 149 (C.A.D.C., 1942), *Rivers* v. *Dixie Broadcasting Corp.,* 88 Ga. App. 131, 76 S.E. (2d) 229 (Ct. App. 1953), 3 *Restatement of Law of Torts,* sec. 680, notes 11 Geo. Wash. L. Rev. 118 (1942), 41 Mich. L. Rev. 549 (1942), 34 Am. Jur. "Malicious Prosecution" sec. 19.1; see also *Saum* v. *Proudfit,* 122 N.J.L. 96 (Sup. Ct. 1939), *Stein* v. *Schmitz,* 21 N.J. Misc. 218 (Sup. Ct. 1943), affirmed 137 N.J.L. 725 (E. & A. 1948). Moreover, the filing of a complaint with one of our ethics and grievance committees is in effect a filing with the Supreme Court, in which alone the power to discipline attorneys at law in New Jersey resides, *Const. art. VI, sec. 2, par. 3.* The several county ethics and grievance committees established under our rules of court, R.R. 1:16-1, *et seq.,* are arms of the court which perform the very important functions of receiving complaints, investigating them, holding hearings on them, and then presenting their findings to the court. The Supreme Court, however, has at all times full control over the proceedings and regardless of the conclusion of the committee a full report must be submitted to the court, R.R. 1:16-4(h), which, although giving due weight to the findings and conclusions of the committee, has the sole responsibility of deciding whether the attorney in question should be disciplined. From the very beginning a disciplinary proceeding is judicial in nature, initiated by filing a complaint with an ethics and grievance committee.

The basic question before us is whether public policy requires that the filing of a complaint with an ethics and grievance committee be privileged. In dealing with this issue we are confronted by two conflicting considerations of policy. On the one hand there is the injury that may be suffered by any attorney as a result of the institution of disciplinary proceedings against him on what turns out to be improper or groundless charges. Even if the charges against him are found to be baseless and the complaint is dismissed, he still may suffer from the public knowledge of these proceedings which may damage his reputation and injure his ability in the future to earn a living. Consideration of the interests of the attorney led our former Supreme Court to uphold an action similar to that involved here in *Stein* v. *Schmitz*, 21 N.J. Misc. 218 (1943), but on appeal the Court of Errors and Appeals expressly reserved the decision on this point, 137 N.J.L. 725 (1948).

On the other hand, however, it is in the public interest to encourage those who have knowledge of any unethical conduct of attorneys to present such information to the appropriate county ethics and grievance committee so that this court may carry out its constitutional disciplinary duties. Disciplinary proceedings against members of the bar are *sui generis*. In *In re Ries*, 131 N.J.L. 559, 562 (Sup. Ct. 1944) the true function of the disciplinary proceeding is described:

> "But the proceeding is not criminal in nature. It is an exercise of the summary disciplinary jurisdiction of this court over attorneys and counsellors, as officers of the court. *Strong & Sons* v. *Mundy*, 52 N.J. Eq. 833. It is civil in character, or, perhaps, it is more accurate to say it is *sui generis*, for it partakes, essentially, of an inquiry to determine whether the delinquent practitioner is unworthy of the trust and confidence which attend the relationship of attorney and client. This is necessarily the basic consideration. The object of disciplinary pro-

> ceedings is not alone to punish the attorney guilty of malpractice; the primary purposes are to compel the attorney to deal fairly and honestly with his client, and to determine whether he has, by his conduct, proved himself unfit to be entrusted with the duties and responsibilities of the office of attorney. *In re Lentz*, 65 N.J.L. 134. If it is thereby evident that there is such deficiency of character as disqualifies him for the confidence and trust inherent in the office, the public interest requires that he be ousted; and this wholly apart from any consideration of punishment."

In *In re Chernoff*, 344 Pa. 527, 26 A. (2d) 335, 339 (Sup. Ct. 1942) the court repeated well established principles that "the suspension or disbarment of an attorney is, like his admission, a judicial act, based upon due inquiry into his fitness for the office" and that "the purpose of disbarment is not the punishment of the attorney, but the maintenance of the purity of the bar. Disbarment is for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them." In carrying out its constitutional power and duty to discipline attorneys the Supreme Court requires the assistance of both the bar and the public. It is only through the cooperation of those with knowledge of unethical conduct on the part of attorneys that the court is made aware of such conduct as requires action on its part. It is thus in the public interest to encourage those who have such information to forward it to the court through the filing of complaints with the county ethics and grievance committees, free from any threats of or danger of a possible malicious prosecution suit against the complainant by the accused attorney or his friends.

In attempting to do justice as between these two conflicting interests, we are necessarily forced to give great weight to the fact that we have been charged by the Constitution with the solemn duty of ridding the bar of those who are unfit to practice our profession. As we have seen, this is fundamentally a duty to the public

and it is necessary that we make every effort to do this job to the best of our ability. If each person who files a complaint with the ethics and grievance committee may be subject to a malicious prosecution action by the accused attorney there is no question but that the effect in many instances would be the suppression of legitimate charges against attorneys who have been guilty of unethical conduct, a result clearly not in the public interest. And although to deprive an attorney of his right to recover damages in a civil action for the malicious filing of such a complaint without probable cause occasionally works a hardship upon the attorney (this is the first instance under the new Constitution and even this might not have arisen had it come before us after our recent decisions in *In re Genser*, 15 N.J. 600, 606, *supra*, and *In re Carlsen*, 17 N.J. 338, 346, *supra*), we are of the opinion that this result must follow if we are to properly carry out our constitutional duty to maintain the high standards in our bar. We therefore find that the filing of a complaint with an ethics and grievance committee is privileged and that an attorney cannot predicate a malicious prosecution action or similar suit upon it. In reaching this determination we have in mind that this court has at all times the inherent power to punish for contempt those who may file baseless complaints or falsely testify or otherwise attempt to hinder the due process of justice and we should not hesitate to use this power if the circumstances warrant it to protect the interest of an aggrieved member of the bar.

Affirmed.

JACOBS, J. concurring.

Our law looks with some disfavor upon actions in the nature of malicious prosecution and places upon the plaintiff the responsibility of proving not only lack of probable cause but also actual malice and special injury. See *Mayflower Industries* v. *Thor Corp.*, 15 N.J. Super. 139, 151 (Ch. Div. 1951), *aff'd*, 9 N.J. 605 (1952). But our

law does not wholly prohibit such actions and the interests of justice do not suggest that it should. To the contrary, Dean Prosser, in his discussion of actions for the wrongful institution of civil proceedings, has pointed out that "there is no policy in favor of vexatious suits known to be groundless, which are a real and often a serious injury; and the heavy burden of proof upon the plaintiff, to establish both lack of probable cause and an improper purpose, should afford sufficient protection to the bona fide litigant and adequate safeguard against a series of actions". *Prosser, Torts,* 886 (1941).

The Monmouth County Ethics and Grievance Committee conducted extensive hearings during which the plaintiff and his counsel participated. The witnesses against the plaintiff, as well as the plaintiff and his witnesses, were examined and cross-examined fully and detailed factual findings, amply supported by the evidence, were made by the committee. It determined, without any dissenting voice, that the plaintiff was "guilty of unethical and unprofessional conduct". Although this Court ultimately dismissed the proceeding because it found that the plaintiff was acting as real estate broker rather than attorney, it at no time suggested disagreement with the Committee's findings relating to the morally offensive nature of his conduct. In the light of these particular circumstances it would grossly disserve the interests of justice to permit the plaintiff to relitigate the factual issues determined by the Committee, for the purpose of establishing the essential elements, particularly the lack of probable cause, of an action in the nature of malicious prosecution. Probable cause for the institution of a civil suit has been defined as "the presence of reasonable ground for belief that the cause of action exists supported by circumstances sufficient to warrant an ordinarily prudent man in the belief that it exists". *Mayflower Industries* v. *Thor Corp., supra,* 15 N.J. Super. at 153. And the Restatement indicates that a judgment favorable to the person who initiated

the original suit is generally conclusive of probable cause even though subsequently reversed on appeal. *Restatement, Torts,* § 675, comment (b), § 680, comment (b), (1938). Decisions lending support are found in *Prosser, supra* at 878, where the author notes that a conviction after trial, even though it is subsequently reversed, obviously presents strong evidence and is usually held to be conclusive as to the existence of probable cause. See Note, *Probable Cause in Actions for Malicious Prosecution,* 3 *Ark. L. Rev.* 445, 449 (1949).

The majority's affirmance of the lower court's dismissal does not, however, rest on the ground that, under the very compelling circumstances presented, the plaintiff is in no just position to show lack of probable cause. Instead, it announces the far-reaching doctrine that ethics proceedings are absolutely privileged and that an attorney has no individual redress no matter how patently false and malicious is the charge against him or how grossly hurtful is the wrong committed against him. No supporting decisions are cited; indeed, the decisions which are cited all lend persuasive support to the contrary view. In *Stein* v. *Schmitz,* 21 N.J. Misc. 218 (Sup. Ct. 1943), *aff'd,* 137 N.J.L. 725 (E. & A. 1948) Judge Wolber stated with manifest fairness that "the attorney is protected, like any other person, against a wrong predicated upon actual malice"; that persons engaged in other professions or occupations would justly receive protection against malicious proceedings seems to be unchallenged.

In *Saum* v. *Proudfit,* 122 N.J.L. 96 (Sup. Ct. 1939) the former Supreme Court recognized that an action in the nature of malicious prosecution could be rested upon a false complaint filed against a real estate broker with the Real Estate Commission. Similar recognition is found in *Melvin* v. *Pence,* 130 F. 2d 423 (Ct. of App. D.C. 1942) where Justice Rutledge dealt with an action in the nature of malicious prosecution based on a proceeding instituted against a licensed detective before the licensing authorities of the District of Columbia, and in *National Surety*

Co. v. *Page*, 58 F. 2d 145 (4th Cir. 1932) where the court dealt with an action based on a proceeding to revoke the license of an insurance agent. In the *Page* case Circuit Judge Parker pointed out that such a proceeding against an insurance agent is calculated to injure his reputation and affect his business; that it should be instituted not for the benefit of an individual but for the protection of the public; and that if it is instituted maliciously and without probable cause there is "no reason why the party injured thereby should not have redress in an action in damages just as he would in the case of a groundless criminal prosecution". See also *Prosser, supra* at 887; 143 A.L.R. 157 (1943); 6 *U. Det. L. J.* 101 (1943); 41 *Mich. L. Rev.* 549 (1942).

In his treatment of the English authorities Sir John Salmond states that actions for malicious prosecution or in the nature thereof may be maintained not only on the basis of wrongful criminal proceedings but also on the basis of unwarranted bankruptcy or liquidation proceedings or certain other civil proceedings involving special grievance. He raises the specific question as to whether an action in the nature of malicious prosecution may be maintained "at the suit of a solicitor whom the defendant has maliciously endeavored to have struck off the roll"; and he makes the pertinent observation that "If malicious proceedings in bankruptcy are, as we have seen, a good cause of action, there seems to be no reason why a similar conclusion should not be drawn with respect to the proceedings mentioned". *Salmond, Torts*, 739 (11th ed. 1953).

Attorneys at law have aptly been described as professional men who follow a common calling in a spirit of public service and nonetheless so because they thereby earn their livelihood. Throughout our Country's history they have been in the forefront in promoting the public welfare and much is owed them for their ever continuing leadership in defense of democratic institutions. They play a vital part in our judicial system which displays such

high solicitude for civil liberties and individual rights and, while they are periodically subject as a class to false attacks, they readily withstand them by adherence to their dedicated tasks of furthering the interests of justice. But when these attacks become irresponsibly malicious and individualized they wrongfully place in jeopardy the reputation and very livelihood of the particular practitioner involved; and while the individual attorney is entitled to no greater judicial protection under these circumstances than the law affords to those who follow other professions and occupations, he is, in all justice, entitled to no less. The contrary holding, that those who devote so much of their lives towards attaining equal protection under law for others should be denied it for themselves, seems ironic indeed.

The notion that the granting of protection to the individual attorney might impair the public interest by discouraging disclosures of misconduct, seems to have little substance. It must be remembered that the action in the nature of malicious prosecution would be maintainable only upon an affirmative showing that the ethics complaint was actually malicious, lacked probable cause and resulted in special injury; it would not be maintainable where the complaining party, though mistaken, acted with that elemental honesty of purpose and belief which may rightly be expected of all complainants. It is difficult to believe that recognition of the action as thus limited would discourage any ethics complaints which ought to justly be made. See *Winfield, Torts,* 747 (6th ed. 1954) where Sir Percy Winfield soundly pointed out that the action for malicious prosecution developed gradually, for it had to make its way between two competing principles—the freedom of action that every man should have in bringing violators to justice and the necessity for checking "lying accusations of innocent people"; that for some time judges "oscillated between apprehension of soaring off a just accuser and fear of encouraging a false one"; but that the action was long ago put on a firm basis and "is so much

hedged about with restrictions and the burden of proof upon the plaintiff is so heavy that no honest prosecutor is ever likely to be deterred by it from doing his duty".

While I would affirm the lower court's judgment of dismissal, I would do so on the ground that in the instant matter the plaintiff is in no just position to show lack of probable cause for the ethics proceeding.

WACHENFELD, J. (Dissenting)

I am in accord with the majority's holding in so far as it indicates an action for malicious prosecution will lie for the institution, maliciously and without probable cause, of disciplinary proceedings against an attorney. There is much authority to support this conclusion. Originally, actions for malicious prosecution could be based only upon the wrongful institution of a criminal action, but as early as 1816 the former Supreme Court extended the rule, holding that such an action was maintainable if based upon the wrongful prosecution of a civil suit if the defendant in that suit was "arrested without cause and deprived of his liberty, or made to suffer other special grievance different from, and superadded to the ordinary expense of a defense." *Potts* v. *Imlay,* 4 N.J.L. 382, 386 (Sup. Ct. 1816); *Bitz* v. *Meyer,* 40 N.J.L. 252, 254 (Sup. Ct. 1878); *Schneider* v. *Mueller,* 132 N.J.L. 163, 166 (E. & A. 1944); *Mayflower Industries* v. *Thor Corp.,* 15 N.J. Super. 139, 151 (Ch. 1951), aff'd 9 N.J. 605 (1952).

See the authorities cited in Justice Jacobs' concurring opinion.

An attorney, perhaps more than anyone else, may suffer serious injury when false and malicious accusations of unprofessional conduct are lodged against him in the form of a complaint before a grievance committee.

However, I cannot join the majority when it concludes that the public interest underlying the duty and functions of this court in disciplinary matters involving members of

the legal profession makes it necessary to deny relief to an attorney for the wrong which he has suffered—relief which would ordinarily be available to any other member of the community in like circumstances.

In support of this conclusion, the majority holds that to sustain the instant complaint would deter citizens from bringing charges of unprofessional conduct against attorneys, and in the interest of maintaining high standards and qualifications for membership in the bar, we must permit unfettered resort to grievance committees even by those who willfully, maliciously and falsely make a complaint.

But we are concerned in the instant case with a complaint which alleges the defendant filed a false charge against the plaintiff, without reasonable or probable cause, and that she did so "maliciously and with a design of forcing plaintiff to accede to the unconscionable demands of the defendant." At this stage of the proceedings, we are, of course, obliged to accept the allegations of the complaint as true, and the fact that the grievance committee, before whom the charges were made, subsequently filed a presentment against plaintiff with this court should not automatically deprive him of his day in court on his complaint.

I cannot understand how the filing of a knowingly false and malicious charge against an attorney before a grievance committee to advance private interests can be said to aid us in fulfilling our constitutional duty to maintain the high standards of the bar or to advance the public interest. To confer blanket immunity in such a situation will, in my opinion, have precisely the opposite effect. Those who have legitimate grievances against attorneys need no cloak of immunity as an inducement to file complaints with grievance committees. Granting immunity will only serve to encourage the use of disciplinary proceedings as privileged sanctuaries to carry on personal

vendettas and excursions of ill will disassociated from the true facts in a cause. It will weaken, rather than strengthen, the disciplinary process and will make a mockery of equity and justice.

I would reverse the judgment entered below and remand the cause for trial on the issues alleged in the complaint.

BURLING, J. (Dissenting)

I am in accord with the philosophy expressed by Mr. Justice Jacobs in his concurring opinion with respect to the existence of the plaintiff's substantive right of action for malicious prosecution.

The complaint in the present case was attacked by motion before an answer was filed. The complaint alleged that the charge made against the plaintiff by the defendant in the disciplinary proceedings was "false and without reasonable or probable cause." Summary judgment on the merits was not sought by the defendant. There were no affidavits filed relating to the alleged falsity of the charges made by the defendant herein on the disciplinary proceedings taken in respect to the plaintiff herein. See R.R. 4:58-3. The sole issue determined on the motion was a question of law, whether the complaint stated a claim on which relief could be granted.

The defendant's motion also attacked the sufficiency of the allegations of the complaint concerning the alleged falsity of the charges levied at the plaintiff herein in the disciplinary proceedings. It seems to me the allegations of falsity should be amplified. Cf. R.R. 4:8-1; 4:8-5; 4:9-1; 4:12-5.

For the reasons expressed in this dissenting opinion I would reverse the judgment of the Superior Court, Law Division, and remand the matter to the Superior Court, Law Division, for reinstatement of the complaint and for further proceedings in accordance with the pertinent Rules of practice and procedure and applicable substantive law.

APPENDIX B

(Mandate on Affirmance)

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 1759
Civil Action On Appeal
Mandate on Affirmance

HOWARD LIONEL TOFT, *Plaintiff-Appellant,*

vs.

MARY G. KETCHUM, *Defendant-Respondent.*

This cause having been duly argued before this Court by Mr. Martin Kimmel, counsel for the appellant and Mr. Oliver R. Kovacs, Counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court-Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court-Law Division to be there proceeded with in accordance with the rules and practices relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice at Trenton on the second day of May, 1955.

JOHN H GILDEA
Clerk of the Supreme Court

Filed May 2, 1955
JOHN H. GILDEA, *Clerk*

APPENDIX C

(Opinion on Reargument)

SUPREME COURT OF NEW JERSEY

No. A117 — September Term 1954

HOWARD LIONEL TOFT, *Plaintiff-Appellant*,

vs.

MARY G. KETCHUM, *Defendant-Respondent*.

Argued March 7, 1955. Decided May 2, 1955
Reargued June 13, 1955. Decided June 20, 1955
On reargument.

Mr. Martin Kimmel argued the cause for the appellant.

Mr. Oliver R. Kovacs argued the cause for the respondent.

Mr. Harry Green, Mr. Lionel P. Kristeller, Miss Emma E. Dillon, and Mr. Franklin H. Berry filed a brief on behalf of the New Jersey State Bar Association, amicus curiae.

PER CURIAM

The judgment is affirmed for the reasons expressed in the opinion of Mr. Chief Justice Vanderbilt heretofore filed. Mr. Justice Jacobs votes to affirm for the reasons expressed in his concurring opinion previously filed. Mr. Justice Wachenfeld and Mr. Justice Burling vote to reverse for the reasons expressed in their respective dissenting opinions previously filed. See - N.J. -